IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

STEVE BARNES — PLAINTIFF

vs. — Civil Action No. 1:95cv333-D-D

FEDERAL EXPRESS CORPORATION,
BRIAN FAUGHNAN and JUDY L. PARKER — DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the defendants for the entry of summary judgment on their behalf as against all of the plaintiff's claims in this cause. Finding that the motion is only partially well taken, the court shall grant it in part and deny it in part.

. Factual Background[1]

This case has quite an involved background, and this court shall not attempt to set forth an entire history of the relevant events today. To the extent that additional facts are required, the court shall relay them in the discussion of the plaitniff's claims. In order to "set the stage," however, the basic facts underlying the plaintiff's claims are as follows.

In January of 1987, the defendant Federal Express Corporation ("FedEx") hired plaintiff Steve Barnes as the Operations Manager of the FedEx station located in Tupelo, Mississippi. In August of 1992, FedEx placed defendant Judy L Parker in the position of Senior Manager of an area including the Tupelo station. As such, Ms. Parker became Barnes' immediate supervisor. After Parker became Senior Manager of the area including the Tupelo station, but sometime before May of 1994, two Operations Manager positions became vacant and had to be filled. Parker hire two white males to fill those positions. Because of Ms. Parker's failure to hire a

[1] In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The court's factual summary is so drafted.

minority[2] to fill either position, her superior, defendant Brian J. Faughnan, became upset. Parker mentioned the fact to the plaintiff on one occasion:

> A: . . . [W]e were discussing something about the managers - - new managers, I believe, and [Judy Parker] told me that she caught hell from Brian for not hiring minority - - minorities to replace those vacancies.
>
> Q: Did she say why she caught hell from Brian?
>
> A: Because he had told her to - - specifically told her that she needed to hire minorities for those positions.

Unnumbered Exhibit to Plaintiff's Response, Deposition of Steve Barnes, p. 312.

Beginning in June of 1994, Parker began to receive regular criticism from Parker regarding his workplace performance and to impose new expectations of performance upon Barnes. Parker's complaints and continued problems with Barnes' work continued, and on September 26, 1994, Parker sent a letter to Barnes, which stated in part:

> This letter is to confirm our discussion that took place on Friday, September 23. During this conversation we mutually agreed that it would best serve the Tupelo Station, the employees and the Company overall if you were to look for another position outside of Tupelo.
>
> You will be given until November 1, 1994, to secure another position. . . .

Exhibit #10 to Deposition of Steve Barnes, Letter dated Sep. 26, 1994. The plaintiff, however, stated that the receipt of this letter took him "totally off guard." Exhibit Barnes' recollection of the events was that his agreement to leave was not as voluntary as the letter might sound:

> Q: Okay, and isn't it true that you agreed that it was time for you to move on, to look to somewhere else, other than Tupelo, to work?

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[2] FedEx apparently imposes upon itself an affirmative action program with regard to its hiring practices, as reflected in a self-contradictory provision of the FedEx PEOPLE Manual:

> All considerations that affect [hiring] selection are made without regard to race, color, religion, sex . . . . Selection for positions under this policy is based on job requirements reflecting those qualifications as outlined in Corporate job descriptions, *taking into consideration the Corporation's Equal Employment Opportunity / Affirmative Action Plan (EEO/AAP) goals . . . .*

Unnumbered Exhibit to Defendant's Motion, PEOPLE Manual, § 4-65 (emphasis added). Part of Parker's criticism of Barnes' performance also concerned the affirmative action goals of FedEx. Exhibit #17 to Deposition of Steve Barnes, Performance Review Steve Barnes dated Jan. 4, 1995 ("Steve has failed to make any good faith efforts toward achievement of Affirmative Action goals."). However, the problem did not exist at the time Parker performed an earlier performance review of the plaintiff. Exhibit #18 to Deposition of Steve Barnes, Performance Review Steve Barnes dated Dec. 22, 1993 ("Steve is extremely thourough in his hiring practices.")

A: Yeah, I said that under the circumstances with the way she was handling me, I felt like, like I said earlier, that, you know, one of us - - I didn't say this earlier, one of us had to go, but it wasn't going to be her

Q: She didn't tell you that, correct?

A: That's correct.

Q: She didn't tell you that you had 30 days and then you are out of there, did she?

A: Not in those specific words, *but I got the message*.

Q: But that was your interpretation of what she was saying, right, because we have already discussed, she told you or, excuse me, you both agreed that it would be best for you to look for another position outside of Tupelo, right?

A: That's - - that's what she told me. *Those are the words, but that's not the meaning, and thats - -*

. . .

Q: It's your testimony that that you did not agree that it was the best thing to to attempt to transfer out of the Tupelo station?

A: Yes, under the circumstances. I mean, with the phrase there, best thing, it was not - - there was nothing good about it, and it wasn't by choice, it was by, you know, but what would happen to me if I didn't. *The writing was on the wall as far as I was concerned, and if I didn't agree, if I fought her in any way, then she would find progressive discipline to give me to achieve her goal of getting rid of me.*

Deposition of Steve Barnes, p. 185-86, 192 (emphasis added). The plaintiff sought and recieved additional time to obtain another position from defendant Faughnan. After seeking several other management positions within the company to no avail, Barnes eventually was demoted to "swing driver," a nonmanagement job.

After his demotion, the plaintiff filed an internal EEO greivance against Faughnan and Parker. FedEx appointed Faughnan to investigate the claims. Barnes informed Parker that he had filed the grievance, and on that same day Parker issued Barnes a bad performance review and another demotion. In seeking to obtain additional information in support of his internal EEO charge, Barnes began to survey FedEx employees. Subsequently, defendant Faughnan suspended Barnes for two days without pay and removed him from the Tupelo station for "disruptive conduct" and "malicious statements." Faughnan gave Barnes two options for transfer - either

Memphis or Florida. Barnes chose Florida, but failed to show up for work as scheduled. FedEx terminated Barnes' employment on August 23, 1994. This action followed.

. Discussion

. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

. Race Discrimination[3]

[3]As an initial note, the court comments upon the term "reverse discrimination." The parties use the term frequently to refer to the type of action at bar, and sadly enough, the phrase is prevalent even in published opinions throughout the federal court system in reference to race discrimination cases involving Caucasian plaintiffs. "Reverse discrimination" is, however, a non-sequitur in the context of a Title VII claim. Without regard to whether the term has an appropriate meaning in any other arena, the use of the word "reverse" is entirely superfluous in a Title VII action, for the alleged wrong is simply that of discrimination based upon race. Philip L. Fetzer, *'Reverse Discrimination': The Political Use of Language*, 17 T. MARSHALL L. REV. 293, 299 ("The most popular use of the term "reverse discrimination" suggests that it is the same as traditional discrimination. Use of the term in this way focuses upon a particular act which provides a preference for persons disfavored by reason of race or gender."). The court does recognize, that while unnecessary, the term has become popular as delineating claims of discrimination against members of a majority group, e.g., Caucasians. In any event, the use of the term does not affect the analysis of the plaintiff's claims at bar.

. Individual Defendants

Only "employers" are liable for race discrimination under the terms of Title VII. Garcia v. Elf Atochem North America, 28 F.3d 446, 451 n.2 (5th Cir.1994); Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir.1994). This court has recently afforded substantial discussion to the fact that fellow employees, while potentially capable of imposing Title VII liability upon the employer by their actions, cannot be held personally liable under that statute. Dandrige v. Chromcraft Corp., 914 F. Supp. 1396, 1404 (N.D. Miss. 1996) ("The Fifth Circuit law is clear - - supervisors cannot be held personally liable under Title VII."). As such, the plaintiff cannot maintain actions arising under Title VII[4] against defendants Faughnan and Parker for race discrimination in their individual capacities. The defendants motion for summary judgment shall be granted in this regard, and the plaintiff's Title VII claims against Faughnan and Parker individually shall be dismissed.

. The Prima Facie Case

Title VII of the Civil Rights Act of 1965 provides in relevant part:

> It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .

42 U.S.C. § 2000e-2(a)(1). Title VII protects all employees from racial discrimination, regardless of race. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280, 96 S.Ct. 2574, 2578, 49 L.Ed.2d 493 (1976) ("The Act prohibits all racial discrimination in employment, without exception for any group of particular employees . . . . "). The ultimate question in an asserted case of racial discrimination under Title VII is whether the plaintiff's race was a factor in an adverse employment decision against him. Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 544

[4] This fact does not, however, prevent the plaintiff from pursuing claims of race discrimination against these individual defendants under § 1981. See, e.g., Harrington v. Harris, 108 F.3d 598, 602, 607 (5th Cir. 1997) (affirming § 1981 verdict against individual); Patterson v. PHP Healthcare Corp., 90 F.3d 927, 933 (5th Cir. 1996) (affirming in part § 1981 verdict against individual); Faraca v. Clements, 605 F.2d 956, 957 (5th Cir. 1975) (holding individual liable under § 1981).

(5th Cir. 1994) ("A claim under Title VII . . . cannot 'succeed unless the employees' protected trait actually played a role in that process and had a determinative influence on the outcome.'").

However, given that many employment discrimination cases involve elusive factual questions, the Supreme Court has devised an evidentiary procedure that allocates the burden of production and establishes an orderly burden of proof when the plaintiff is unable to come forward with direct evidence of discrimination. In a claim of race discrimination brought under Title VII,[5] the evidentiary procedure to be utilized was originally introduced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and more recently reaffirmed in St. Mary's Honor Ctr. v. Hicks, 509 U.S. --, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Under McDonnell Douglas, the plaintiff has the initial burden of proving a *prima facie* case of discrimination. Id. at 802. If the plaintiff establishes *a prima facie* case, a presumption of discrimination arises and the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the discharge." Flanagan v. Aaron E. Henry Community Health Serv. Ctr., 876 F.2d 1231, 1233-34 (5th Cir. 1989); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980). The employer need not prove the absence of a discriminatory motive. Whiting, 616 F.2d at 121. Once the employer articulates its nondiscriminatory reason, the burden is again on the plaintiff to prove that the articulated legitimate reason was a mere pretext for a discriminatory decision. Id. Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. Id. (citing Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1382 (5th Cir. 1980)). Even if the plaintiff succeeds in revealing the defendant's reasons for terminating him were false, he still bears the ultimate responsibility of proving the real reason was unlawful "intentional discrimination." See St. Mary's, 125 L.Ed.2d at 424 ("It is not enough to disbelieve the

[5] The McDonnell-Douglas framework is employed not only for race discrimination claims under Title VII, but also to race discrimination claims arising under § 1981. Harrington, 108 F.3d at 605; LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 448 n.2 (5th Cir. 1996); Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996). As such, the court's *prima facie* case discussion applies equally to the plaintiff's remaining § 1981 claims against the individual defendants.

employer; the fact finder must believe the plaintiff's explanation of intentional discrimination.").

At the summary judgment stage, plaintiff need not present a *prima facie* case of discrimination, but must simply raise a genuine issue of material fact as to the existence of a *prima facie* case. Thornborough v. Columbus & Greenville R. Co., 760 F.2d 633, 641 n.8 (5th Cir. 1985). In order for the typical Title VII plaintiff to establish a *prima facie* case of racial discrimination in a disparate treatment context, he must show that he:

1) was a member of a protected class;
2) was qualified for the position that he held;
3) suffered an adverse employment decision; and
4) the plaintiff's employer replaced him with a person who is not a member of the protected class, or in cases where the employer does not intend to replace the plaintiff, the employer retains others in similar positions who are not members of the protected class.

Meinecke v. H & R Block Income Tax Sch., Inc., 66 F.3d 77, 83 (5th Cir. 1995); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992); Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633, 642 (5th Cir. 1985) (citing Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981)), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982).

) The First Element

The defendant argues that in this case, the first element of the *prima facie* case is different than normal. As the plaintiff is Caucasian, the defendant argues, he is required to prove as the first element of his *prima facie* case that he "belonged to a racial minority within the company." The Fifth Circuit has imposed upon white race discrimination plaintiffs such a requirement in the past without explanation. See, e.g., Flanagan v. A.E. Henry Community Health Servs. Cen., 876 F.2d 1231, 1233 (5th Cir. 1989); see also Jett v. Dallas Independent School Dist., 798 F.2d 748, 756 (5th Cir.), *aff'd in part,* 491 U.S. 701, 737, 109 S.Ct. 2702, 2723-24, 105 L.Ed.2d 598 (1989); Whiting v. Jackson State Univ., 616 F.2d 116, 123 (5th Cir. 1980). As a result of Flanagan, several district courts within the Fifth Circuit have followed this requirement. See, e.g., Patton v. United Parcel Service, 910 F. Supp. 1250, 1263 (S.D. Tex. 1995); Switzer v.

Texas Commerce Bank, 850 F. Supp. 544, 547 (N.D. Tex. 1994); Puissegur v. United States Postal Service, 1996 WL 185812, * 7 n. 4 (E.D. La. Apr. 18, 1996). In its most recent opinions involving white race discrimination plaintiffs, however, the Fifth Circuit has not imposed this additional hurdle. See, e.g., Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995); Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990); see also Lejeune v. Avondale Industries, Inc., 1996 WL 225029, *3 (E.D. La. May 1, 1996) ("[The] [p]laintiff being white, the first element of his prima facie case is established."). Chief Judge L.T. Senter, speaking for this court, has also declined to utilize it. Miller v. Benton Co. Sch. Dist., Civil Action No. 3:94cv79-S-A (N.D. Miss. Apr. 12, 1995) (Memorandum Opinion).

The United States Supreme Court has noted that the traditional elements of a *prima facie* case of racial discrimination do not prevent the racial protections of Title VII from extending to cover white plaintiffs:

> As we particularly noted, however, this "specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." Requirement (I) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination.

McDonald, 427 U.S. 273, 279 n.6, 96 S.Ct. 2574, 2578 n.6 (citation omitted). What the McDonald decision does not do, however, is explain how the *prima facie* case is different in such a case. In attempting to resolve the question, the various Circuit Courts have split primarily down two lines. One group of courts makes no distinction by race with regard to the establishment of a *prima facie* case. See, e.g, Shealy v. City of Albany, 89 F.3d 804, 805 (11th Cir. 1996); McNabola v. Chicago Transit Auth., 10 F.3d 501, 514 (7th Cir 1993); see also Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (stating elevated standard for white plaintiffs "evicerate[s] McDonnell-Douglas as applied in reverse discrimination cases, . . . forc[ing] the courts to take on the unseemly task of deciding which groups are 'socially favored' and which are 'socially disfavored.'"). Other circuits, however, require a majority plaintiff to demonstrate "background circumstances [that] support the

suspicion that the defendant is that unusual employer who discriminates against the majority." See, e.g., Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (court required plaintiff to show "background circumstances" but stated that it had "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); Harding v. Gray, 9 F.3d 150, 152 (D.C. Cir. 1993); Sanchez v. Phillip Morris, 992 F.2d 244, 248 (10th Cir. 1993) (requiring "background circumstances" from male plaintiff in gender discrimination case); see generally Peter Gene Baroni, *Background Circumstances: An Elevated Standard of Necessity In Reverse Discrimination Claims Under Title VII*, 39 HOW. L.J. 797 (1996). If the prevailing standard within the Fifth Circuit is, as the defendant suggests, that a white plaintiff in a race discrimination case must *necessarily* establish that he "belonged to a racial minority within the company," then the Fifth Circuit stands alone in imposing such a requirement.

This court finds it notable that male plaintiffs in the Fifth Circuit are not subject to a similar heightened *prima facie* case requirement when suing under Title VII for gender discrimination. See, e.g., Martinez v. El Paso County, 710 F.2d 1102, 1104 (5th Cir. 1983) ("Since Title VII proscribes gender-based discrimination, [the male] plaintiff certainly satisfies the first element."). Likewise, the first *prima facie* case requirement for a religious discrimination claim under T Jenkins v. Louisiana, 874 F.2d 992, 994 (5th Cir. 1989) (noting first element of religious discrimination *prima facie* case under Title VII is only that employee have a "bona fide religious belief that conflicts with an employment requirement."); E.E.O.C. v. J.C. Penney Co., 753 F. Supp. 192, 197 (N.D. Miss. 1990) (Title VII religious discrimination claim involving religious belief that plaintiff should not work on Sunday). Indeed, this court would be extremely hesitant to delve into determinations of what religious beliefs are sufficiently "mainstream" to warrant the imposition of a heightened *prima facie* case requirement. When looking to this fact and to the most recent cases within the Fifth Circuit, it would appear that the prevailing weight of authority lies with the proposition that there is no differential *prima facie*

requirement for white plaintiffs in race discrimination cases as suggested by the defendant's reading of Flanagan. Nevertheless, none of the Fifth Circuit cases subsequent to Flanagan are *en* banc decisions, and the decision of one panel cannot overrule another. See, e.g., United States v. Pettigrew, 77 F.3d 1500, 1511 (5th Cir. 1996); Winchester v. U.S. Atty. for Southern Dist. of Texas, 68 F.3d 947, (5th Cir. 1995); Texas Refrigeration Supply v. FDIC, 953 F.2d 975, 983 (5th Cir.1992). Therefore, Flanagan binds this court, and the undersigned is required to follow its dictates.

The question remains - what does Flanagan dictate? Does it require that this court necessarily impose upon every white race discrimination plaintiff the requirement that he prove as the first element of his *prima facie* case that he was part of the minority at his workplace? The answer must be no. The elements of a *prima facie* case of discrimination are not static, and vary with the facts of each particular case. McDonnell-Douglas, 411 U.S. at 800, 93 S.Ct. at 1823 ("The facts necessary will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations."); Thornburough, 760 F.2d at 641 ("The necessary elements of a prima facie employment discrimination case are not Platonic forms, pure and unchanging; rather, they vary depending upon the facts of a particular case."). While the particular facts of Flanagan, Jett, and Whiting may have justified the use of this factor[6] in the establishment of a *prima facie* case of race discrimination in those cases, this does not mean that *every* majority plaintiff in a race discrimination case must do the same. It is important to remember that the plaintiff's burden of establishing a *prima facie* case of discrimination is not onerous. Price Waterhouse v. Hopkins,

[6] In Whiting, the court listed as the first element of the *prima facie* case that "he is belongs to a group protected by the statute." Whiting, 616 F.2d 116, 121. The court later noted in that opinion that proving that the plaintiff was in a "racial minority" at his employment was sufficient to meet the first element. Id. at 123. In Jett, the court did not list the elements, but merely stated that "Jett more than met the normal minimum requirements for a prima facie case of discrimination by presenting evidence . . . that he was a member of a racial minority at South Oak Cliff . . . " Jett, 798 F.2d at 756. Only in Flanagan has the Fifth Circuit explicitly stated membership in a minority within the workplace as an element. Flanagan, 876 F.2d at 1233.

490 U.S. 228, 270, 109 S.Ct. 1775, 1801 ; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 215 (1981); Arenson v. Southern Univ. Law Center, 911 F.2d 1124, 1127 (5th Cir. 1990). Reduced to its essence, in order to establish a *prima facie* case of racial discrimination, the plaintiff need only prove that he was terminated under circumstances that give rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253, 101 S.Ct. at 1093, 67 L.Ed.2d at 215; see also O'Connor v. Consolidated Coin Caterers Corp., --- U.S. ---, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433, (1996) (noting "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . ...') (quoting Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977)) (emphasis added)). Even when applying the "minority in the workplace" requirement, the Fifth Circuit has noted that the prima facie case requirements are consistently applied regardless of the plaintiff's race. Jett v. Dallas Independent School Dist., 798 F.2d 748, 756 (5th Cir. 1986) ("[The McDonnell-Douglas] scheme of proof applies to white persons *in the same manner* that it applies to blacks.") (emphasis added).

Particular elements of a *prima case* vary, depending upon the facts of a given case. The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Burdine, 450 U.S. at 254, 101 S.Ct. at 1094. Many potential facts which can give rise to an inference of discrimination against white employees may occur in the absence of a workplace primarily composed of non-whites. Imposing a mandatory "minority in the workplace" requirement on all majority plaintiffs, as the defendant suggests, would foreclose the creation of a *prima facie* case in many instances of discrimination, when the United States Supreme Court created the *prima facie* case to ease the burden on plaintiffs seeking to prove discrimination.[7] The "background circumstances" element utilized by many circuits more

[7] For example, suppose a company with a white majority workforce seeks to fill a janitorial position, and hires a black man to fill the position based upon the anachronistic notion that blacks are genetically "better suited" for such a job. Without direct evidence of discrimination, a white applicant passed over for that job would be without a

adequately encompasses the plethora of relevant facts that may give rise to such an inference of discrimination, and this court believes that it is the proper standard to be utilized in the case at bar.[8]

However, regardless of whether the Fifth Circuit imposes a "minority in the workplace" or "background circumstances" element upon a white plaintiff seeking redress for alleged racial discrimination, all of the elements of a prima facie case must conform to the facts of a particular cause. In this case, the plaintiff has placed before the court proof that his superiors were "catching hell" for not hiring minority employees, and that one of his supervisors received a $2,000.00 bonus for meeting minority hiring goals *after* terminating the plaintiff and replacing him with a black employee. These facts more than equate for the absence of Flanagan's "minority in the workplace" element to raise an inference of discrimination because this court presumes that the act of firing the plaintiff under these circumstances, if otherwise unexplained, is more likely than not based on the consideration of the impermissible factor of the plaintiff's race. Further, the proffered facts also satisfy a "background circumstances" analysis to set forth proof to "support the suspicion that the defendant is that unusual employer who discriminates against the majority." Regardless of the approach used by this court, the undersigned finds that the plaintiff is capable of creating a genuine issue of material fact with regard to the initial element of his *prima facie* case.

. Qualified for the Position

The defendants, in seeking to demonstrate that the plaintiff was not qualified for the position which he held, have put forward substantial proof that Mr. Barnes failed to live up to the

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remedy under the defendant's asserted mandatory *prima facie* case elements. Several other scenarios also come to mind, not the least of which is the asserted type of action at bar, where a white majority employer intentionally discriminates against white workers to achieve a more "balanced" workplace without sufficient justification to implement such an affirmative action program. See Bakke While such an altruistic goal is admirable, this type of intentional discrimination based upon race is prohibited by Title VII.

[8] The fact that a white plaintiff is a member of a minority within the workplace would certainly constitute a "background circumstance" sufficient to meet the needs of establishing a *prima facie* case, as illustrated by Flanagan, Jett and Whiting.

expectations of performance set by defendant Judy Parker.[9] What the defendants have not sufficiently established for summary judgment purposes, however, is that the expectations imposed upon Mr. Barnes were reasonable or that compliance with similar expectations was commonplace by other FedEx employees with similar responsibilities. For example, the plaintiff stated in his deposition that while he was required to perform eight (8) "check rides" per month, other comparable employees were not. Unnumbered Exhibit to Plaintiff's Response, Plaintiff's Dep. p. 118 ("The district standard for managers in my grade level was six."). Likewise, there is evidence before the court that the plaintiff's failure to meet Parker's requirement one hundred percent (100%) PRISM[10] compliance was not unusual:

> Q: Okay. You are also told that there is no excuse for anything less than 100 percent PRISM compliance every month; is that correct?
> A: Yes.
> Q: And, in fact, as we mentioned earlier, PRISM compliance was not a hundred percent every month, was it?
> A: That's correct.
> Q: Okay.
> A: *Which was not uncommon within the, you know, the district, the company,* whatever, what have you.

Unnumbered Exhibit to Plaintiff's Response, Plaintiff's Dep. p. 127 (emphasis added). The court also notes that the defendants argue that the plaintiff *agreed* that many of the expectations placed upon him were reasonable. E.g., Defendants' Memorandum Brief, p.17 ("Plaintiff does not disagree with the performance expectations . . . , specifically that . . . there is no excuse for anything less than 100% PRISM compliance every month . . . "). However, the evidence referenced to the court for this proposition does not support such a finding. Rather, the plaintiff

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[9] Many courts employ a variant of this element of the *prima facie* case in a termination context, and require that the plaintiff demonstrate that he "was performing his job at a level that met his employer's legitimate expectations." See, e.g., O'Connor, 116 S.Ct. at 1308 (noting Fourth Circuit's approach); Sample v. Aldi Inc., 61 F.3d 544, 547 (7th Cir. 1995); Hutson v. McDonnell Douglas, 63 F.3d 771, 776 (8th Cir.1995). The difference appears merely semantical to this court, for the practical application of either element yields identical results.

[10] Other than the plaintiff's statement in his response brief that PRISM is a "personnel reporting system," the court is substantially uniformed as to exactly what PRISM is, much less why "100% compliance" can be reasonably required out of an operations manager at FedEx. The parties, in their briefs to this court, make use of several terms of art without explaining to the court the meanings of those terms or to refer the court to appropriate deposition excerpts which explain those terms.

merely agrees that the expectations were in fact *imposed* upon him, or that he did not *meet* the expectations which were imposed. This evidence is not probative to the issue of whether the expectations themselves were *reasonable*. As the plaintiff stated in his deposition:

Q: But you knew that check rides were required, eight of them?

A: She could require me to jump off a bridge.

Unnumbered Exhibit to Plaintiff's Response, Plaintiff's Dep. p.119. All in all, the court finds that genuine issues of material fact remain as to whether the plaintiff can prove this element of his *prima facie* case. The defendants have simply failed to present adequate evidence to demonstrate that there is no genuine issue of material fact as to whether the expectations of the plaintiff's supervisors

. Adverse Employment Decision/Replacement by a Non-Caucasian

The defendants do not, in their summary judgment submissions to the court, argue that genuine issues of material fact exist as to the remaining elements of the plaintiff's *prima facie* case. As such, they have not carried their burden in this regard.

. Legitimate, Nondiscriminatory Reason for Discharge

Once the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendants to articulate a legitimate, nondiscriminatory reason for discharge. See, e.g., Grimes v. Texas Dept. Of Mental Health, 102 F.3d 137, 143 (5th Cir. 1996); Williams v. Time Warner Operation, Inc., 98 F.2d 179, 181 (5th Cir. 1996); Polanco v. City of Austin, Tex., 78 F.3d 968, 975 (5th Cir. 1996). The defendants' burden is merely one of production, and they need not persuade the court that they were actually motivated by the proffered reason. St. Mary's, 509 U.S. at ----, 113 S.Ct. at 2748; Mayberry v. Vought Aircraft, 55 F.3d 1086, 1091 n.4 (5th Cir. 1995); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993). In this case the defendants offer as their legitimate reason that the plaintiff failed to meet the legitimate work expectations of FedEx. If believed, this reason offers sufficient grounds to terminate the plaintiff. The defendants have carried their burden in this regard.

. Proof of Pretext and The Ultimate Question of Discrimination

Once the employer articulates its nondiscriminatory motive, the plaintiff must prove that the articulated legitimate reason was a mere pretext for a discriminatory decision and that discrimination was a motivating factor behind the employer's decision. The *prima facie* case drops out of the analysis, and the burden of persuasion to establish the statutory violation ultimately rests with the plaintiff, "who must establish the statutory violation by a preponderance of the evidence." Even if the plaintiff succeeds in revealing defendants' reasons for terminating her were false, she still bears the ultimate responsibility of proving the real reason was "intentional discrimination." Saint Mary's Honor Center v. Hicks, --- U.S. ----, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("It is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."). This is not to say that the employee is *required* to prove that the reason is *in fact* false, but only that the proffered reason was not the only real motivation behind the employer's decision and that discrimination was at least a motivating factor in that decision. Again, a plaintiff is not required to prove that discrimination based upon race was the sole reason for the termination, because the employer may be held liable under Title VII even if legitimate reasons also played a role in the plaintiff's termination.

> [S]ince we know that the words "because of" do not mean "solely because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.

Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989). Nevertheless, the fact that a plaintiff may establish genuine issues of material fact as to his *prima facie* case does not necessarily mean that she may avoid summary judgment on his discrimination claims. LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 450 (5th Cir.1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir.1996). Rather, to avoid the grant of a properly made motion for summary judgment, a plaintiff must ultimately present evidence sufficient to make a reasonable inference of discriminatory intent. LaPierre, 86 F.3d at 450.

> [A] jury issue will be presented and a plaintiff can avoid summary judgment ... if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which the plaintiff complains.

Id. (citing Rhodes, 75 F.3d at 994). According to the United States Supreme Court, such evidence of pretext will permit a trier of fact to infer that the discrimination was intentional:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required...."

St. Mary's, 509 U.S. at ----, 113 S.Ct. at 2749, . Determining that a particular reason did not actually serve as the sole basis for termination is an entirely different inquiry than determinating whether the proffered reason is in fact true or false. For example, whether a person is incompetent is a different question from whether an employer fired that person for being incompetent. It is important to remember the distinction.

In this case, there is sufficient proof[11] in the record presently before the court for a reasonable trier of fact to determine that the plaintiff was terminated on account of his race. There is no evidence before the court of any workplace performance problems by the plaintiff from the time of his hiring by FedEx in 1987 up until August of 1992, when defendant Judy Parker became his immediate supervisor. Likewise, there is no evidence in the record of problems with Barnes' workplace performance under Parker as his supervisor until *after* Parker "caught hell" for not hiring minorities in two "operations manager" positions. Only then does Barnes' performance on the job apparently become deficient. Performance evaluations made of the plaintiff by the defendant also turned sour after the "catching hell" incident, as reflected in the

[11] Indeed, the court finds that the record evidence before the court might even suffice as "direct evidence" of discrimination to allow the court to circumvent any *prima facie* case analysis. See, e.g., Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1047 (5th Cir. 1996); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 148 (5th Cir. 1995); Portis v. First Nat. Bank of New Albany, MS, 34 F.3d 325, 328 (5th Cir. 1994) ("Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption.").

evaluations submitted by the defendants. Taken in the light most favorable to the plaintiff, as the court must on a motion for summary judgment, a reasonable juror could find for the plaintiff on this evidence alone. This is particularly true when considering that the defendants have failed to dispel genuine issues of material fact with regard to what "legitimate" workplace expectations were imposed upon the plaintiff. While the trial of this matter may reveal to the trier of fact that no unreasonable expectations were placed upon the shoulders of Steve Barnes, there is currently insufficient proof before the court to make that determination as a matter of law. The motion of the defendants shall be denied as to the plaintiff's remaining claims of race discrimination.

. Retaliation

. The Prima Facie Case

The McDonnell Douglas framework is also applicable to the plaintiff's claim of retaliation under Title VII. Therefore, a plaintiff establishes a *prima facie* case for unlawful retaliation by proving (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action. Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 140 (5th Cir. 1996); Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir.1996); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. S 2000e-3(a); Grimes, 102 F.3d at 140; Long, 88 F.3d at 304. Further, as to whether an "adverse employment decision occurred:

> our court has stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions". Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir.1995). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating". Id. at 782 (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981)).

Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

In this case, it appears undisputed that the plaintiff meets the first two elements of his *prima facie* for retaliation. Steve Barnes filed a charge of discrimination with the EEOC against FedEx on February 7, 1995. However, the plaintiff need not have actually filed a charge with the EEOC "to engage in a protected activity" which triggers the anti-retaliation protections of Title VII. See, e.g., Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993); Patton v. United Parcel Service, 910 F. Supp. 1250, 1268 (S.D. Tex. 1995) (noting "the protection afforded by Title VII is not limited to individuals who have filed formal complaints of discrimination, but also extends to informal protests."). Barnes also voiced his belief that he was being improperly treated by virtue of his race via an FedEx internal grievance procedure as early as December 30, 1994.

On the same day that Barnes informed Parker that he had filed an internal EEO complaint against her, she issued him a letter of "leadership failure" and relieved him of any remaining management duties. In June of 1995, FedEd suspended him for two days without pay and transferred him out of the Tupelo station for "disruptive behavior" and "malicious statements." Defendant Faughnan gave Barnes a choice - he could transfer to either Memphis or to somewhere in Florida. The disruptive behavior in question involved Barnes' attempt to survey employees at the Tupelo station as to their viewpoints on matters relating to his EEOC charge of discrimination.

The defendants argue that the plaitniff is unable to avoid summary judgment on his claim of retaliation because he cannnot show a causal connection bewteen a protected activity and an adverse employment decision. In viewing the facts of this case as a whole, the court does not agree. Mr. Barnes may indeed be able to prevail on this claim at the trial of this matter. For example, while the court is unclear as to exactly what transpired with regard to Barnes' solicitation of information from FedEx employees with regard to his claims, it appears that Barnes may be able to show that his suspension and immediate transfer out of the Tupelo station

was in retaliation for engaging in the protected activity of investigating his own EEOC charge.[12] In any event, this court has the discretion to deny the defendants' motion for summary judgment and allow the plaintiff to proceed to trial in order to more fully develop the record for the trier of fact. Kunin v. Feofanov, 69 F.3d 59, 61 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989). In light of this court's denial of the defendants' motion with regard to the plaintiff's claim of race discrimination against FedEx, the court choses to exercise that discretion and shall deny the motion as to the plainiff's claim of retaliation under Title VII.

. Conclusion

After condsideration of the defendants' motion for summary judgment, the court finds the motion partially well taken. As such, the court shall grant the motion insofar as it pertains to the plaintiff's claims arising under Title VII against the individual defendants Brian Faughnan and Judy L. Parker. As to the remainder of the plaintiff's claims, the court shall deny the motion.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

_____
United States District Judge

[12] Contrary to the defendants' arguments, close timing between an employee's protected activity and an adverse action against him may provide the "causal connection" required to make out a prima facie case of retaliation. Swanson v. General Services Admin., --- F.3d ---, 1997 WL 165761, *9 (5th Cir. Apr. 24, 1997); Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir.1993). Such a temporal proximity will not, however, be sufficient to overcome an employer's proffered legitimate, nondiscriminatory reason and establish pretext for retaliation. Swanson, 1997 WL 165761, * 9 ("[O]nce the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action *and the timing*, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive.") (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

STEVE BARNES — PLAINTIFF

vs. — Civil Action No. 1:95cv333-D-D

FEDERAL EXPRESS CORPORATION,
BRIAN FAUGHNAN and JUDY L. PARKER — DEFENDANTS

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

) the motion of the defendants for the entry of summary judgment on their behalf is hereby GRANTED insofar as it pertains to the plaintiff's Title VII claims of racial discrimination and retaliation against defendants Brian Faughnan and Judy L. Parker. Those claims are hereby DISMISSED;

) as to the remainder of the plaintiff's claims, the motion is hereby DENIED.

SO ORDERED, this the _____ day of April 2001.

_____
United States District Judge